

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: PCS/SB 558

SPONSOR: Health, Aging, and Long-Term Care Committee and Senator Saunders

SUBJECT: Medical Malpractice

DATE: March 14, 2003

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Wilson</u>	<u>Wilson</u>	<u>HC</u>	<u>Unfavorable</u>
2.	<u>                    </u>	<u>                    </u>	<u>JU</u>	<u>                    </u>
3.	<u>                    </u>	<u>                    </u>	<u>AP</u>	<u>                    </u>
4.	<u>                    </u>	<u>                    </u>	<u>RC</u>	<u>                    </u>
5.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
6.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

## I. Summary:

The bill limits noneconomic damages to no more than \$250,000 in any action for personal injury or wrongful death arising out of medical negligence.

This bill creates section 766.1041, Florida Statutes.

## II. Present Situation:

### Availability and Affordability of Medical Malpractice Insurance

Medical malpractice insurance covers doctors and other professionals in the medical field for liability claims arising from their treatment of patients. Rapidly rising medical malpractice insurance premiums and the departure of many insurance companies from the medical malpractice market have created a crisis of affordability and availability in many areas of the country, including Florida.

After almost a decade of essentially flat prices, medical malpractice insurance premiums began rising in 2000. According to the Department of Insurance, rate increases for physicians and surgeons from the top 15 professional liability insurers (ranked by direct written premium in Florida as reported 12/31/01) ranged from a minimum of 33.5 percent to a maximum of 149.9 percent from 1/1/01 through 1/1/03. There was a 73 percent average rate increase, weighted for market share. Rate increases for the top three insurers ranged from 74.3 percent to 81.3 percent for the two-year period.

In October, 2002, the Department of Insurance surveyed 18 insurers (top 15 malpractice writers in Florida and 3 other insurers known to be writing coverage) to determine the status of insurers departing the state and the status of insurers writing new business. Of the 18 insurers, five

medical malpractice insurers had decided to no longer write any new or renewal business in Florida. Four additional insurers were not accepting any new business from physicians. Nine remaining insurers were still accepting new business in October, 2002. As of February 28, 2003, the largest medical malpractice insurer in the state, which had not been writing new business in October, 2002, decided to resume writing new business.

While there is general agreement that medical malpractice insurance premiums have risen sharply and that physicians are having a more difficult time obtaining medical malpractice insurance coverage, there appears to be little agreement on the causes of these problems. Insurers and doctors blame “predatory” trial attorneys, “frivolous” law suits, and “out of control” juries for the spike in insurance premiums. Consumer groups accuse insurance companies of “price gouging” and cite “exorbitant” rates of medical errors. Plaintiffs’ attorneys also point to medical errors, and to “predatory” pricing practices and bad business decisions of insurers during the 1990s.

There is also disagreement about possible solutions to these problems. Insurers and physicians demand tort reform, changes in the legal system that will limit the frequency of litigation and the amount of damage awards. Attorneys argue that past legal reform has unfairly blocked victims’ access to the courts while doing nothing to bring down the costs of malpractice insurance. They see the solution in regulation of the insurance industry. Patient advocates focus on safety and suggest mandatory reporting of medical errors and a no-fault approach to victim compensation.

Whatever the causes and solutions, the effects of the rising cost of medical malpractice insurance and the reduction in the availability of such coverage are being felt in Florida’s health care system. There have been numerous reports of doctors discontinuing doing risky procedures, retiring prematurely, practicing without insurance, and leaving litigious areas of the state in an effort to deal with the price of liability coverage. In some cases, the decision of high risk specialists to reduce or eliminate their services has led to further reductions in services by hospitals. Some hospitals are discontinuing services such as maternity services and trauma services because of the high cost of malpractice coverage for the specialists needed to provide these services.

### **Governor’s Select Task Force on Healthcare Professional Liability Insurance**

In recognition of the problems with the affordability and availability of medical malpractice insurance, Governor Bush appointed the Governor’s Select Task Force on Healthcare Professional Liability Insurance on August 28, 2002, to address the impact of skyrocketing liability insurance premiums on health care in Florida. The Task Force was charged with making recommendations to prevent a future rapid decline in accessibility and affordability of health care in Florida and was further charged to submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by January 31, 2003.

The Task Force had ten meetings at which it received testimony and discussed five major areas: (1) health care quality; (2) physician discipline; (3) the need for tort reform; (4) alternative dispute resolution; and (5) insurance premiums and markets. The final report of the Task Force includes findings and 60 recommendations to address the medical malpractice crisis in Florida.

The reports and information received by the Task Force, as well as transcripts of the meetings, were compiled into thirteen volumes that accompany the main report.

The following findings and recommendations relating to setting limits on noneconomic damages in medical malpractice cases are included in the final report of the Task Force. The Task Force found that “the very existence of the continuing medical malpractice crisis is proof that the previous reforms have failed to provide a solution to the problem. Florida’s use of many of the reforms considered or adopted by other states further demonstrates that the provisions related to medical malpractice adopted in Florida have not been sufficient in addressing the problem. The limitation on damages, the only provision proven to be effective in reducing the severity of judgments, was stricken by the Florida Supreme Court.”

*Recommendation 27.* The Legislature should, in medical malpractice cases, cap non-economic damages at \$250,000 per incident. The Task Force believes that a cap on non-economic damages will bring relief to this current crisis. Without the inclusion of a cap on potential awards of non-economic damages in a legislative package, no legislative reform plan can be successful in achieving the goal of controlling increases in healthcare costs, and thereby promoting improved access to healthcare. Although the Task Force was offered other solutions, there is no other alternative remedy that will immediately alleviate Florida’s crisis of availability and affordability of healthcare. The evidence before the Task Force indicates that a cap of \$250,000 per incident will lead to significantly lower malpractice premiums.

The Legislature should commission and fund a study of the impact of the \$250,000 cap on non-economic damages. An interim report should be submitted to the legislature five years after date of enactment.

The Task Force concluded the following.

Although all of the recommendations contained in the final report of the Task Force are important, the most important one is a cap on non-economic damages in the amount of \$250,000. In an Issue Brief on federal medical malpractice tort reform, the American Academy of Actuaries recommend that Congress look to California’s successful experience with a cap on non-economic damages. The Academy concluded:

For reform to be effective in reducing costs, the cap on non-economic awards should be established on a per-medical-injury basis at a level low enough to have an impact (e.g., \$250,000).

In light of this recommendation of the Academy of Actuaries and California’s successful experience at the \$250,000 level, the Task Force finds that a cap at the level of \$250,000 on a per incident basis will be effective.

The Task Force finds that actual and potential jury awards of non-economic damages (such as pain and suffering) are a key factor (perhaps the most important factor) behind the unavailability and un-affordability of medical malpractice insurance in Florida. The

Task Force further finds that malpractice insurance premiums are a large component of the cost and availability of healthcare in Florida.

Based upon the evidence before it, including evidence of Florida's unsuccessful previous efforts to eliminate the ongoing medical malpractice crises, and the successful experiences of other states that have imposed caps on potential jury awards of non-economic damages, the Task Force finds that imposing caps on non-economic damages in medical malpractice cases will significantly reduce the exposure of Florida healthcare providers to risk of loss from jury awards of inherently subjective damages. Such a reduction of risk will make malpractice losses much more predictable, and thereby lead to stability in malpractice insurance premium rates.

A reduction in potential liability and resulting stability will encourage more malpractice insurers to participate in the Florida market. This, along with the reduced exposure to risk, will permit insurers to charge lower premiums, on a sound financial basis. Lower premiums will encourage providers (particularly those in high-risk specialties) to offer healthcare services to Floridians, and persons visiting this state, and to do so at lower prices.

### **California's Medical Injury Compensation Reform Act of 1975**

In the 1970's California, like Florida, was facing a crisis in the availability of medical malpractice insurance. In response, California's legislature enacted the Medical Injury Compensation Reform Act of 1975 (MICRA). Among other things, it imposed a \$250,000 cap on medical malpractice awards for noneconomic losses. MICRA's core statutory language governing awards of noneconomic damages is as follows:

- In any action for injury against a healthcare provider based on professional negligence, the injured plaintiff shall be entitled to recover non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other non-pecuniary damage.
- In no action shall the amount of damages for non-economic losses exceed two hundred fifty thousand dollars (\$250,000).

MICRA was challenged in court and it wasn't until 1985 that the final court challenges to the validity of the statute were concluded. MICRA is credited with keeping malpractice premiums from rising as rapidly in California as in the rest of the country, but there is disagreement among the stakeholders in the malpractice debate over whether the cap is a cause of California's success.

### **History of Caps on Noneconomic Damages in Florida**

Florida's Medical Malpractice Reform Act has been subject to constitutional challenges regarding the infringement on a party's right of access to courts in civil actions by the imposition

of caps on noneconomic damages.<sup>1</sup> The test for assuring the right of access to the courts was declared in *Kluger v. White* in which the Florida Supreme Court held that:

Where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. s. 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.<sup>2</sup>

In 1986 the Legislature imposed a \$450,000 cap on non-economic damages for all negligence actions<sup>3</sup>. In *Smith v. Department of Insurance*, the Florida Supreme Court held that an absolute \$450,000 cap on noneconomic damages for losses suffered by a victim of negligence violated the tort victim's right of access to the courts.<sup>4</sup>

The rationale underlying the court's decision was based on the test announced in *Kluger*, regarding the right of access to courts. To impose a cap on noneconomic damages the Legislature would have to: (1) provide a reasonable alternative remedy or commensurate benefit, or (2) make a legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.<sup>5</sup>

The Florida Legislature revised the Act again in 1988 following the recommendations made by the Academic Task Force for Review of Insurance and Tort Systems. The 1988 legislation allows either party to a malpractice action to request voluntary binding arbitration of damages and precludes other remedies by the claimant against the defendant.<sup>6</sup> In addition, the claimant's noneconomic damages are capped at \$250,000 per incident and are calculated on a percentage basis with respect to capacity to enjoy life.

In *University of Miami v. Echarte*, the Florida Supreme Court held that statutes providing a monetary cap on noneconomic damages in medical malpractice claims when a party requests binding arbitration are not unconstitutional and do not violate the access to courts provision of the Florida Constitution.<sup>7</sup> In *Echarte*, the court upheld the cap on noneconomic damages despite arguments that the statutes failed to provide a reasonable alternative to protect the rights of medical malpractice plaintiffs to redress injuries because the court found that the statutes at issue provide a commensurate benefit to the plaintiff in exchange for the monetary cap, the Legislature was found to have demonstrated the requisite overpowering public necessity for restricting

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<sup>1</sup> Noneconomic damages are defined as "nonfinancial losses which would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses. See §766.202(7), Florida Statutes.

<sup>2</sup> See *Kluger v. White*, 281 So.2d 1 (1973), at 4.

<sup>3</sup> See section 59, chapter 86-160, Laws of Florida.

<sup>4</sup> *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987).

<sup>5</sup> See *Smith v. Dep't of Ins.*, 507 So.2d 1080 at 1088 (Fla. 1987).

<sup>6</sup> See ss. 766.207 and 766.209, Florida Statutes.

<sup>7</sup> *University of Miami v. Echarte*, 585 So.2d 293 (Fla. 3<sup>rd</sup> DCA 1991), rev'd, 618 So.2d 189 (Fla.), cert. denied, 114 S.Ct. 304 (1993).

claimant's noneconomic damages by showing an overpowering public necessity existed with regard to the control of medical malpractice premiums, and no alternative or less onerous method of meeting the crisis had been shown.<sup>8</sup> The court's conclusion that no alternative or less onerous method of meeting the public necessity is supported by the Legislature's actions in adopting both the Task Force's recommendations to enact arbitration statutes and to strengthen regulation of the medical profession.<sup>9</sup>

In 1988, a proposed constitutional amendment petition to place a \$100,000 cap on non-economic damages was defeated at the polls.

Claimants may also challenge the imposition of caps on noneconomic damages under other constitutional claims such as the violation of the right to trial by jury, equal protection guarantees, substantive or procedural due process rights, the taking clause, the single subject requirement or the non-delegation doctrine.

### **Analysis of Noneconomic Losses from Florida Medical Malpractice Closed Claims**

Florida legislative staff analyzed the Florida medical malpractice closed claims data reported to the Department of Insurance and issued a report on February 20, 2003.<sup>10</sup> The report examined noneconomic losses as a percent of total claims and concluded that, over the period 1985 through November 2002, non-economic losses accounted for 53.5 percent of total paid indemnity claims.

Tables 11a, 11b, and 11c in the report provide a more detailed breakdown of noneconomic losses in 2000, 2001 and 2002, as well as an estimate of the mean value of noneconomic losses for each of those years if noneconomic damages had been capped at \$250,000. Means taking into consideration zero noneconomic and non-zero noneconomic claims are both presented.

In 2000, there were 15 claims closed with noneconomic losses greater than \$1,000,000, in 2001 there were 10 such claims, and in 2002 (through November) there were 14 such claims. For these three years, claims that had noneconomic losses greater than \$1,000,000 were around 1 percent of all paid indemnity claims closed. In each of these years, there were about 60 claims closed with noneconomic losses greater than \$500,000. These claims accounted for less than 5.3 percent of paid indemnity claims closed in each of these years.

In 2000, there were 163 claims closed with noneconomic losses in excess of \$250,000. While these 163 claims represent only 13.2 percent of all paid indemnity closed claims, 44 percent of the total noneconomic damages would not have been paid if they had been capped at \$250,000. The total amount of losses that would not have been paid if noneconomic losses were capped at \$250,000 was \$77,343,640. This amounts to 22.7 percent of total losses paid in 2000.

In 2001, there were 140 claims closed with noneconomic losses in excess of \$250,000. While these 140 claims represent only 11 percent of all paid indemnity closed claims, 36.7 percent of

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<sup>8</sup> Id. at 194, and 196-197.

<sup>9</sup> Id. at 197.

<sup>10</sup> "Analysis of Florida Medical Malpractice Closed Claims Data Reported to the Department of Insurance", February 20, 2003, prepared by staff of the Senate Committee on Banking and Insurance, Senate Committee on Health, Aging, and Long-Term Care, Senate Committee on Judiciary, and Office of Economic and Demographic Research.

the total noneconomic damages would not have been paid if they had been capped at \$250,000. The total amount of losses that would not have been paid if noneconomic losses were capped at \$250,000 was \$58,649,490. This amounts to 18.2 percent of total losses paid in 2001.

In 2002 (through November), there were 136 claims closed with noneconomic losses in excess of \$250,000. While these 136 claims represent only 11.1 percent of all paid indemnity closed claims, 41.1 percent of the total noneconomic damages would not have been paid if they had been capped at \$250,000. The total amount of losses that would not have been paid if noneconomic losses were capped at \$250,000 was \$65,112,498. This amounts to 18.5 percent of total losses paid in 2002.

### **III. Effect of Proposed Changes:**

The bill creates s. 766.1041, F.S., to limit noneconomic damages to no more than \$250,000 in any action for personal injury or wrongful death arising out of medical negligence. Noneconomic losses include, but are not limited to, losses to compensate for pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, and loss of capacity for enjoyment of life.

The bill will take effect upon becoming a law, but only if SB 560, SB 562, SB 564, and SB 566 or similar legislation is adopted in the same legislative session or an extension thereof and becomes law.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

#### **B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

#### **C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

#### **D. Other Constitutional Issues:**

The imposition of caps on noneconomic damages raises questions about possible infringements on the right of access to the courts. To impose a cap on noneconomic damages in medical malpractice claims, which would meet the constitutional test established by the Florida Supreme Court in *Kluger v. White*, the Legislature would have to: (1) provide a reasonable alternative remedy or commensurate benefit, or (2) make a legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Using medical malpractice claims closed during 2000, 2001, and 2002 as a baseline, approximately 150 claimants a year would have noneconomic damages reduced under a \$250,000 cap.

Using medical malpractice claims closed during 2000, 2001, and 2002 as a baseline, total losses would be reduced by approximately 20 percent if a cap of \$250,000 was placed on noneconomic damages. Approximately \$67 million in noneconomic losses would not be paid out each year. This represents a saving to medical malpractice insurers, which could be passed on to their insureds through lower malpractice insurance premiums.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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